SUPREME

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1032

CLYDE E. SKEEN,

Petitioner,

v.

VALLEY BANK OF NEVADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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No. .....

CLYDE E. SKEEN,

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VALLEY BANK OF NEVADA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner, Clyde E. Skeen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nevada, entered in the proceeding on July 9, 1973.

OPINION BELOW

The opinion of the Nevada Supreme Court, the trial court judgment which it affirmed and the order denying rehearing appear in Appendices A, B and C, respectively.

JURISDICTION

The judgment of the Supreme Court of the State of Nevada

was entered on July 9, 1973. A petition for rehearing before said court, timely filed, was denied on September 17, 1973, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. Sec. 1257(3).

FEDERAL QUESTION PRESENTED

The Nevada Rules of Civil Procedure were amended in 1971 to delete the necessity of willfulness from the requirements for imposing a default judgment as against defendants who fail to comply with discovery procedures. Petitioner, after being served in a proceeding in the Second Judicial District Court of the State of Nevada, failed to appear at depositions in the matter after being noticed to appear. There was no showing at all in the proceedings in Nevada as to whether or not petitioner's failure to appear was willful. Petitioner now claims that said failure was not willful. As a result of the failure to appear, the Nevada court ordered the striking of petitioner's answer in the case and entered a substantial default judgment against him. The question thus arising is whether a default judgment may be entered against a party for his failure to comply with discovery rules where there is no showing that his failure was willful. This question is of substantial importance and impact beyond an interpretation of the constitutionality of the Nevada law because the Federal Rules of Civil Procedure are substantially identical to the Nevada law on the point in issue.

THE CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the due process

clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On September 8, 1971, the petitioner guaranteed to the respondent bank a promissory note of $400,000 made by Reno Race Park, Inc. The note, which became due on December 8, 1971, carried an interest rate of 9% and provided for reasonable attorneys' fees in the event of default or suit thereon. Default occurred, with neither interest nor principal having been paid.

On January 4, 1972, the respondent filed a complaint against the petitioner, but not the maker of the note, to recover on the promisssory note that had been guaranteed by him. The petitioner's answer was filed on January 28, 1972. The respondent then submitted a request for admissions which were in turn answered. On March 17, 1972, the respondent filed a notice to take the petitioner's deposition on April 3, 1972. The parties, through their attorneys, stipulated that the time for taking the deposition would be continued until April 17, 1972. The petitioner did not appear on that date. No court order was issued for him to appear at this or any other deposition. There was no showing in this matter as to the willfulness or lack of willfulness on the part of petitioner for the failure to appear at the deposition. The petitioner contends that his failure was not willful.

Upon motion by the respondent, the Nevada District Court struck petitioner's answer, entered a default and awarded

judgment for the full amount of the note, plus interest and attorneys' fees, to the respondent. The petitioner appealed the action to the Nevada Supreme Court contending that the action of the trial court was an unduly harsh sanction and constituted an abuse of discretion. The Nevada Supreme Court, raising the due process issue on its own motion, rejected petitioner's appeal and affirmed the judgment of the trial court. The petitioner raised the due process issue for the first time on his petition for rehearing before the Nevada Supreme Court and that petition was rejected without comment as to the merits of the due process issue.

REASONS FOR GRANTING PETITION

The Nevada Supreme Court, in its decision after its original hearing in this matter, cited the trilogy of cases that this Court has handed down which frame the issue of when the denial of a hearing on the merits is repugnant to the due process clause of the Constitution: *Hovey v. Elliott*, 167 U.S. 409 (1897); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); and *Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

The first case cited, *Hovey*, makes it clear that the courts may not impose a default as a punishment for failure to perform a required act. This Court held, and that holding remains intact today, that such action contravenes the fundamental right guaranteed by the Constitution to a decision on the merits prior to any taking of property. The Court cited in that case a string of American and English decisions spanning centuries establishing this basic right as a fundamental part of the due process

clause. In quoting *Windsor v. McVeigh*, 93 U.S. 274 (1876), at 277, the Court in *Hovey* (at p. 414) set forth the Constitutional principle:

> "Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a common principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

This Court went on (at p. 418) to further quote *Galpin v. Page*, 18 Wall. 350 (1873), at 368:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and he has been afforded an opportunity to be heard*. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

The next case in the trilogy, *Hammond*, refined the principles laid out in *Hovey*, but in no way overruled any part of it. *Hammond* stands for the principle that the legislature may properly set forth rules whereby courts may grant a default for failure to perform a required act where the circumstances permit a logical inference or presumption that the non-response was an admission of lack of merit. The Court stated in *Hammond* (at p. 351) that:

> "The difference between mere punishment as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as fol-

> lows: In the former due process of law was denied by the refusal to hear. In this the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."

This Court went on to say in *Hammond* (at p. 352) that:

> "[F] or a failure to give or produce such evidence, the law might authorize a presumption *in a proper case* against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed." (Emphasis added)

The key point in reading *Hovey* and *Hammond* together is that a default is constitutionally permissible only when a failure to act occurs under facts and circumstances sufficient to give rise to a presumption that such failure indicates lack of merit; *i.e.*, a presumption that goes directly to a fair determination of the merits, which is what the due process clause is designed to protect. Conversely, if the facts and circumstances of the failure do not give rise to a reasonable presumption as to the merits, the rendering of a default would be a mere punishment without a fair determination of the merits of the case at hand and prohibited by the *Hovey* case.

The third case in the trilogy, *Rogers*, consists of an interpretation of Rule 37 of the Federal Rules of Civil Procedure, as it existed in 1958. Then, as now, Rule 37 was the federal rule promulgated in accordance with *Hammond* which set forth the various sanctions, including default, which federal courts could impose for failure to comply with the discovery rules. The Court was asked to decide in *Rogers* whether *any sanctions at all* could

be imposed for a *non-willful* failure to comply with discovery rules. In reply, the Court stated (at p. 208) that:

> "For purposes of a subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply."

In the *Rogers* case the Court, in discussing and expressly approving *Hovey* and *Hammond*, recognized the vast difference between ordinary sanctions and the imposition of a default, which goes to the very heart of due process, when it stated (at p. 209) that:

> "These decisions *(Hovey* and *Hammond)* establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

In the *Rogers* case this Court held the framework of *Hovey* and *Hammond* together by ultimately ruling in the case that although the legislature and the courts could impose some sanctions for a non-willful failure to comply with discovery rules, in the case at hand the failure was non-willful and therefore could not support a presumption of lack of merit.

As the Nevada Supreme Court stated in its opinion on its original hearing of this matter, NRCP 37(d) was amended effective September 27, 1971 to reflect the amendment to Rule

37(d) of the Federal Rules of Civil Procedure, which was effective July 1, 1970, by deleting a requirement, in an attempt to conform to *Rogers,* that a failure to comply with discovery rules be willful prior to the imposition of sanctions.

The petitioner contends that here lies the constitutional error of the Nevada legislature: It removed the requirement of willfulness as against *all* sanctions, including the granting of a default. The amendment completely failed to recognize the fundamental difference in kind — rather than degree — of the sanction of default, which goes to the very heart of the concept of due process and the right to a fair determination on the merits. As *Rogers* made abundantly clear, without the necessary initial fact premise of willfulness, the presumption of lack of merit will not stand. A non-willful failure will not bear an inference as to the merits of the underlying claim. *Hovey, Hammond* and *Rogers,* which must be read together, are in complete harmony on this. The 1971 amendment allowed the Nevada courts to erroneously enter a default judgment against the petitioner for almost a half million dollars without a finding as to willfulness, and thus, without a fair determination as to the merits of the case. The petitioner contends that his fundamental constitutional rights were thus violated by the procedure authorized by NRCP 37(d), and any judgment rendered in reliance thereon is void.

CONCLUSION

For these reasons, a writ of certiorari should issue to review

the decision of the Supreme Court of the State of Nevada.

Respectfully submitted,

HENRY D. AKIN, JR.,
Counsel for Petitioner.

GARY D. BERGER,
Of Counsel.

Dated, December 6, 1973.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the Petition for Writ of Certiorari to the Supreme Court of the State of Nevada have been served upon each party in accordance with the provisions of the Revised Rules of the Supreme Court of the United States, by depositing such copies in the United States post office, airmail postage prepaid, this 12th day of December, 1973, addressed to counsel of record for each party at the post office of each such counsel, as follows:

Leo P. Bergin, III,
Gary A. Wood,
McDonald, Carano, Wilson & Bergin,
60 Court Street,
Reno, Nevada 89505,

Attorneys for Valley Bank of Nevada, Respondent.

Henry D. Akin, Jr.
Counsel for Clyde E. Skeen,
Petitioner.

APPENDIX

89 Nev., Advance Opinion 105

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE E. SKEEN,

Appellant,

v.

VALLEY BANK OF NEVADA,

Respondent.

No. 6988

July 9, 1973

Appeal from an order striking the appellant's answer, entering default and awarding judgment. Second Judicial District Court, Washoe County; John W. Barrett, Judge.

Affirmed.

A. D. Demetras, of Reno, for Appellant.

McDonald, Carano, Wilson & Bergin and *Gary A. Wood*, of Reno, for Respondent.

OPINION

By the Court, BATJER, J.:

On September 8, 1971, the appellant guaranteed to the respondent bank a promissory note of $400,000.00 made by Reno Race Park, Inc. The note, which became due on December 8, 1971, carried an interest rate of nine percent (9%) and provided for reasonable attorneys' fees in the event of default or suit thereon. Default occurred, with neither interest nor principal having been paid.

On January 4, 1972, the respondent filed a complaint against the appellant to recover on the promissory note that had been guaranteed by him. The appellant's answer was filed on January 28, 1972. The respondent then submitted a request for admissions which were in turn answered. On March 17, 1972, the respondent filed a notice to take the appellant's deposition on April 3, 1972. The parties stipulated that the time for taking the deposition would be continued until April 17, 1972. The appellant did not appear on that date, nor was any excuse given for his absence. His attorney, who appeared at the designated time and place for the taking of the deposition, expressed surprise at the non-appearance of his client and indicated that he had received no communication from the appellant which would explain his absence. The reporter commissioned to take the deposition, issued a certification of non-appearance against the appellant.

Upon motion by the respondent, the trial court struck appellant's answer, entered its default and awarded judgment for the full amount of the note, plus interest and attorney fees, to the respondent. The appellant contends that the action of the trial court was an unduly harsh sanction and constituted an abuse of discretion. He also seems to contend that a violation of due process occurred.[1]

The sanctions imposed in this case, are explicitly authorized under NRCP 37(d) and NRCP 37(b)(2)(c). NRCP 37(d) was amended effective September 27, 1971, to delete the require-

[1] In Hovey v. Elliott, 167 U.S. 409 (1897), it was held that punishment of a defendant contemner by depriving him of a hearing on the merits is violative of the due process requirements of the Federal Constitution, but this holding was limited by Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), "by holding that a court could properly strike an answer and enter default judgment under circumstances where a party fails to produce documents as ordered." Norman v. Young, 422 F.2d 470 (10th Cir. 1970). See also, Anno., 14 A.L.R. 2d at 593.

ment that the failure to appear was "willful." NRCP 37(d) as presently worded reflects the amendment to the Federal Rules of Civil Procedure, effective July 1, 1970.

Since the amendment of NRCP 37, sanctions are permissible without consideration of whether the unexcused failure to make discovery was willful.[2]

The imposition by the trial court of these sanctions is not unique and does not amount to an abuse of discretion. Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D.Mo. 1971); Marriot Homes, Inc. v. Hanson, 50 F.R.D. 396, (W.D.Mo. 1970); Schatz v. Devitte, 75 Nev. 124, 335 P.2d 783 (1959). See 4A Moore's Federal Practice § 37.05. Cf. Kahn v. Secretary of Health, Education, and Welfare, 53 F.R.D. 241 (D.Mass. 1971), and Conrad v. Sadur, 83 Nev. 39, 422 P.2d 236 (1967).

Default judgments will be upheld where the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights. H. F. Livermore Corp. v. Aktiengesellschaft Gebruder L., 432 F.2d 689 (D.C.Cir. 1970).

Here the promissory note provided for reasonable attorney fees upon default or suit. NRCP 37 also permits an award of attorney fees. Upon the authority of Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 455 P.2d 31 (1969), and Campanelli

[2] In Societe Internationale v. Rogers, 357 U.S. 197 (1958), the High Court held that a default judgment is a proper sanction if the failure to make discovery is due "to willfulness, bad faith or any fault" and not "due to inability," and concluded that willfulness was relevant only to the selection of sanction, if any, to be imposed. The new provisions of Fed. R. Civ. P. 37 were promulgated to bring the rule into harmony with the holding in *Rogers*. See also, Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970).

v. Altamira, 86 Nev. 838, 477 P.2d 870 (1970), we affirm the district court's award of attorney fees.

The order and judgment of the district court is affirmed.

THOMPSON, C.J., and MOWBRAY, GUNDERSON, and ZENOFF, JJ., concur.

NOTE — These printed advance opinions are mailed out immediately as a service to members of the bench and bar. They are subject to modification or withdrawal possibly resulting from petitions for rehearing. Any such action taken by the court will be noted on subsequent advance sheets.

This opinion is subject to formal revision before publication in the preliminary print of the Pacific Reports. Readers are requested to notify the Clerk, Supreme Court of Nevada, Carson City, Nevada 89701, of any typographical or other formal errors in order that corrections may be made before the preliminary print goes to press.

C. R. DAVENPORT, *Clerk.*

No. 274948

DEPT. NO. 2

In The

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

VALLEY BANK OF NEVADA,
a Nevada banking institution,

Plaintiff,

v.

CLYDE E. SKEEN,

Defendant.

ORDER STRIKING DEFENDANT'S ANSWER ENTERING DEFENDANT'S DEFAULT AND JUDGMENT

Pursuant to the Motion to Strike Defendant's Answer and the Affidavit of Leo P. Bergin, and all records and files in this action, and good cause appearing therefor,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That Defendant's Answer be stricken based upon the motion of Plaintiff for Defendant's failure to appear at depositions after being duly noticed for said depositions.

2. That Defendant's default be entered and judgment be

awarded against Defendant and in favor of Plaintiff, in the following amounts:

a. $400,000.00 to pay Plaintiff for moneys owing from Defendant as guarantor on a Promissory Note made by Reno Race Park, Inc.

b. Interest to May 15, 1972 in the amount of $30,233.33, plus interest from and after May 15, 1972, at the rate of 12% per annum until paid.

c. Costs in the amount of $75.00.

d. Plaintiff's attorneys' fees in the amount of $40,000.00.

DATED this 16th day of May, 1972.

/s/ JOHN W. BARRETT

District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 6988

CLYDE E. SKEEN,

Appellant,

v.

VALLEY BANK OF NEVADA,

Respondent.

ORDER DENYING REHEARING

Rehearing denied: remittitur shall issue forthwith. It is so ORDERED.

/s/ THOMPSON, C. J.
Thompson

/s/ MOWBRAY, J.
Mowbray

/s/ GUNDERSON, J.
Gunderson

/s/ BATJER, J.
Batjer

/s/ ZENOFF, J.
Zenoff

cc: *Counsel of Record*
Honorable H. K. Brown, Clerk

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-932

CLYDE E. SKEEN, *Petitioner,*

vs.

VALLEY BANK OF NEVADA, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Nevada (Appendix to Petition, pp. A1-A4) is reported in 89 Nev. Adv. Op. 105, 511 P.2d 1053 (1973).

JURISDICTION

This Court does not have jurisdiction over this matter for the reason that all issues involving Federal questions were either not presented at all, or were not properly presented to the Nevada Supreme

Court. Thus, there is no Federal question raised by Petitioner that is reviewable by this Court.

STATEMENT OF CASE

Respondent adopts Petitioner's "Statement of the Case" with the following additions. After the failure of Petitioner to appear at the time set for the taking of his deposition, pursuant to a Notice to Take Deposition and the Stipulation of Counsel, Respondent, on April 25, 1972, filed a Motion to Strike Defendant's (Petitioner herein) Answer and for Judgment pursuant to Rule 37(d) of the Nevada Rules of Civil Procedure. Petitioner did not file any responding points and authorities, counter-affidavits or any documents whatsoever in opposition to said Motion and further, Petitioner did not request oral argument on Respondent's Motion to Strike. The Motion was submitted to The Honorable John W. Barrett, District Judge of the Second Judicial District, State of Nevada in and for the County of Washoe, on May 16, 1972, whereupon an order was entered striking Defendant's Answer and entering a Default Judgment against Defendant.

Petitioner timely appealed said Order and Default Judgment to the Nevada Supreme Court on the sole ground that the sanction was unduly harsh and constituted an abuse of discretion. Petitioner did not raise any issue regarding the constitutionality of Rule 37(d) of the Nevada Rules of Civil Procedure in his brief, nor was one argued in oral argument before the Nevada Supreme Court.

Petitioner thus had several opportunities to raise the issue of the unconstitutionality of Rule 37(d) of the Nevada Rules of Civil Procedure, but completely ignored this issue until ofter it was mentioned in passing by the Nevada Supreme Court in its Opinion in this action. Petitioner then, for the first time, raised the due process issue on a Petition for Rehearing before the Nevada Supreme Court.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I

NO FEDERAL QUESTION HAS BEEN PROPERLY OR TIMELY RAISED

Rule 19(a) of the Rules of the Supreme Court of the United States provides, in part, that a writ of certiorari may be granted, "(a) Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided in a way probably not in accord with applicable decisions of this court."

In the present case, the Nevada Supreme Court has not decided a Federal question of substance for the reason that no such question was properly before said Court. Petitioner admits that the issue was not raised until he filed a Petition for Rehearing before the Nevada Supreme Court. Nevada law specifically precludes the raising of new issues on a motion for rehearing. Rule 40 of the Nevada Rules of Appellate

Procedure sets forth the requirements for a petition for rehearing. Rule 40 provides, in part, as follows:

> "(C) SCOPE OF APPLICATIONS; WHEN REHEARING CONSIDERED.
>
> "(1) Matters presented in the briefs and oral arguments may not be reargued on petition for rehearing, and *no point may be raised for the first time on rehearing.*" (Emphasis added)

Thus, Petitioner's argument that Rule 37(d) of the Nevada Rules of Civil Procedure violates the Due Process clause of the United States Constitution was not properly before the Nevada Supreme Court and that Court, therefore, has not decided a Federal question of substance. This Court should not review an issue which was not properly before the lower court.

II

THE RESULT IN THE PRESENT CASE IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

Petitioner relies on three cases of this Court as the basis of his argument that Rule 37(d) of the Nevada Rules of Civil Procedure violates the Due Process clause of the Constitution of the United States, to wit: *Hovey v. Elliott,* 167 U.S. 409 (1897); *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909); *Societe Int'l v. Rogers,* 357 U.S. 197 (1958).

The *Hovey* case held that a Court could not strike an answer and enter a judgment against a party as

a punishment for failure to comply with a Court order. In the *Hammond* case, the holding of the *Hovey* case was "substantially modified" as stated by this Court in the *Societe Int'l* case; 357 U.S. 209. In *Hammond* this Court held that a state court could, consistently with the Due Process clause of the Fourteenth Amendment, strike the answer of, and render a default judgment against, a defendant who refused to produce documents in accordance with a pretrial order. The basis of the *Hammond* opinion is that a legislative body has the power to create a presumption that the refusal to produce material evidence is an admission of the lack of merit in the asserted defense. In the *Hammond* case, this Court stated the following:

> "The proceeding here taken may therefore find its sanction in the undoubtable right of the law making power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. . . . In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. . . . In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, . . ."
>
> 212 U.S. 350-351

Due process is preserved in the present case by the identical presumption which serves as a sanction for Rule 37(d) of the Nevada Rules of Civil Procedure which specifically provides for the striking of an answer and the rendering of a judgment by default against a party who fails to appear at the designated time and place for the taking of his deposition. No showing that the failure to appear was wilfull is required by Rule 37(d).

The *Societe Int'l* case does not require a finding of wilfullness before an answer can be stricken and a default judgment entered as a sanction for failure to comply with discovery rules. The *Societe Int'l* case holds that where there has been a finding that the failure to comply with the pretrial production order has been due to inability, despite good faith efforts to comply and not to wilfullness, bad faith or any fault of the party, then to enter a default against the noncomplying party is a violation of due process. The Court emphasized that the petitioner in the *Societe Int'l* case had made "extensive efforts at compliance." 357 U.S. 211. In so holding, the Court stated at page 212 the following:

> "In view of the *findings* in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we think that Rule 37 should not be construed to authorize dismissal of the complaint because of petitioner's noncompliance with a pretrial production order where it *has been established* that failure to comply has been due to *inability* and

not to wilfullness, bad faith or any fault of petitioner." (Emphasis added)

In the present case, there has been no finding of a good faith effort to comply nor any sort of showing that petitioner had any reason whatsoever for not appearing at the time and place designated for his deposition. The facts in the present case are more than sufficient to support the presumption of lack of merit as set forth in *Hammond*, and are further sufficient to support an implication of wilfullness. The Petitioner admitted the substantive allegations contained in the Complaint in this action in his Answer to Respondent's Request for Admissions. No reason whatsoever, at any time, has been offered by Petitioner for his failure to appear. Petitioner did not even file a response in opposition to Respondent's Motion to Strike. Further, Petitioner never contended in his brief to the Nevada Supreme Court that he had any reason for failure to appear or that for some reason he was unable to comply.

CONCLUSION

The *Societe Int'l* case did not hold, as contended by Petitioner, that it is necessary to show wilfullness in order for the sanction of default to be constitutional. *Societe Int'l* is authority only for the proposition that where there has been an affirmative showing and finding, establishing a good faith attempt to comply and a subsequent inability, then default is not a

proper sanction for failure to comply with discovery rules. In the present case, Petitioner's admission of the subsequent allegations of the Complaint, his failure to appear for the taking of his deposition, and the absence of any explanation therefore, the lack of opposition to the Motion to Strike Defendant's Answer and for Judgment, and the failure to raise the issue on appeal, are more than sufficient to invoke the presumption of lack of merit required by the *Hammond* case, and are indeed affirmative evidence of the wilfullness of his failure to comply with the discovery procedures. Thus, Due Process has been preserved.

Therefore, it is respectfully submitted that the present case is inappropriate for review by the Supreme Court of the United States.

Dated, Reno, Nevada,
January 15, 1974.

Respectfully submitted,
ROBERT L. MCDONALD,
JOHN J. FRANKOVICH,
MCDONALD, CARANO, WILSON,
BERGIN & BIBLE,
Attorneys for Respondent.